

PATENAUE & FELIX, A.P.C.
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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

**TRINA ROADHOUSE, SCOTT
ROADHOUSE**

Plaintiffs,

v.

PATENAUE & FELIX, A.P.C. a Foreign
Corporation, DOES I-V inclusive, and ROE
Corporations VI-X, inclusive,

Defendants.

Case No.: 2:13-CV-0560

**MOTION FOR SUMMARY JUDGMENT
PURSUANT TO FRCP 56**

COMES NOW, PATENAUE & FELIX, A.P.C., by and through their attorneys of
record, Westley U. Villanueva, Esq. of PATENAUE & FELIX, A.P.C., and hereby moves this
Court for Summary Judgment pursuant to Federal Rules of Civil Procedures ("FRCP") 56.

This motion is made and based upon the attached Memorandum of Points and Authorities,
the pleadings and papers on file herein, and any argument of counsel the court may consider at
the hearing on this motion.

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3 **POINTS OF AUTHORITIES**

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5 **STATEMENT OF FACTS**

6 Defendant, PATENAUE & FELIX, A.P.C. ("Defendant") hereinafter "P&F", is a multi-
7 jurisdictional law firm that represents creditors in various states throughout the country. This
8 case concerns the Nevada Division of PATENAUE & FELIX, A.P.C. Attorney Westley U.
9 Villanueva, Esq., who has been licensed since 2003, manages the Nevada Division.
10

11 TRINA ROADHOUSE and SCOTT ROADHOUSE ("Plaintiff") allegations stem from
12 P&F filing a state court action on behalf of Capital One Bank to recover on a credit card debt.
13 P&F and Westley U. Villanueva, Esq. have admitted the case was filed past the statute of
14 limitations.

15 During the summer of 2010 Capital One Bank approached P&F to assist in cleaning up
16 files that had been in disarray due to suicide of Gerald Phillips, Esq. the principle attorney for the
17 firm of Phillips, Harper, and Harper in Reno Nevada. The project included well over 3500
18 accounts. After an initial review over 800 files were closed with an additional 2800 files needing
19 further review due to inaccuracies within those files. On or about September 15, 2010 those 2800
20 files were placed with P&F for further review. This project was the first of its kind for attorney
21 Villanueva and the Nevada Division of Patenaue & Felix, A.P.C. The process took in excess of
22 two years to complete. The account in question was from this segment of accounts. No other
23 issues have presented themselves at the time of this brief concerning these segment of accounts as
24 far as the firm is aware.
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LEGAL ARGUMENT

A. Standard of Review for Summary Judgment

A court must grant summary judgment when “the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. (56(a)). Material facts are those which may affect the outcome of the case. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A dispute as to material fact is genuine if there is sufficient evidence for a reasonable jury to return a verdict for the nonmoving party. *See Id.* A principal purpose of summary judgment is “to isolate and dispose of factually unsupported claims.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 23-24 (1986). In determining summary judgment, a court uses the burden-shifting scheme:

When a party moving for summary judgment would bear the burden of proof at trial, it must come forward with evidence which would entitle it to a directed verdict if the evidence went uncontroverted at trial. In such a case, the moving party has the initial burden of establishing the absence of genuine issue of fact on each issue material to the case. *CAR Transp. Brokerage Co. v. Darden Rests, Inc.*, 213 F.3d 474, 480 (9th Cir. 2000) (citations and internal quotation marks omitted). In contrast, when the nonmoving party bears the burden of proving the claim or defense, the moving party can meet its burden in two ways: (1) by presenting evidence to negate an essential element of the nonmoving party’s case; or (2) by demonstrating that the nonmoving party failed to make a showing sufficient to establish an essential element to the party’s case on which the party will bear the burden of proof at trial. *See Celotex Corp.*, 477 U.S. at 323-245. If the nonmoving party fails to meet its initial burden, summary judgment must be denied and the court need not consider the nonmoving party’s evidence. *See Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 459-60 (1970).

1 If the moving party meets its initial burden, the burden then shifts to the opposing party to
2 establish a genuine issue of material fact. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*,
3 475 U.S. 574, 586 (1986). To establish the existence of a factual dispute, the opposing party need
4 not establish a material issue of fact conclusively in its favor. It is sufficient that “the claimed
5 factual dispute be shown to require a jury or judge to resolve the parties’ differing versions of the
6 truth at trial.” *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass’n*, 809 F.2d 626, 631 (9th Cir.
7 1987). In other words, the nonmoving party cannot avoid summary judgment by relying solely on
8 conclusory allegations unsupported by facts. *See Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir.
9 1989). Instead, the opposition must go beyond the assertions and allegations of the pleadings and
10 set forth specific facts by producing competent evidence that shows a genuine issue for trial. *See*
11 *Fed. R. Civ. P. 56*; *Celotex Corp.*, 477 U.S. at 324.

12
13
14 At the summary judgment stage, a court’s function is not to weigh the evidence and
15 determine the truth, but to determine whether there is a genuine issue of fact for trial. *See*
16 *Anderson*, 477 U.S. at 249. If the evidence of the nonmoving party is merely colorable or is not
17 significantly probative, summary judgment may be granted. *See Id.* at 249-50.

18
19 **B. Patenaude & Felix, A.P.C. admitted it filed the state court action past the applicable**
20 **statute of limitations and immediately offered the maximum statutory damages of**
21 **\$1,000.00. No further case or controversy exists.**

22 The FDCPA is a strict liability statute which makes debt collectors liable for violations
23 even when they are not knowing or intentional. *See Clark v. Capital Credit & Collection*
24 *Services, Inc.*, 460 F.3d 1162, 1176 (9th Cir. 2006). The FDCPA provides that a court may award
25 1.) actual damages and 2.) such further damages as a court may allow not to exceed \$1,000. (*See*
26 15 U.S.C. § 1692(k).

27 P&F understood and acknowledged that it erred in filing suit past the applicable statute of
28

1 limitations and offered the maximum penalty allowed by law of \$1,001.00 by way of a Rule 68
2 offer of Judgment. (See Defendant's Rule 68 Offer of Judgment Exhibit "A") The offer of
3 judgment was served upon Plaintiff a mere 30 days after service of the summons and complaint in
4 this action.

5
6 It is important to note that Plaintiff did not seek to recover attorney fees or even court
7 costs nor was P&F sanctioned in the state court. This point goes to the alleged actual damages
8 claimed by Plaintiff. No actual damages exist.

9
10 **C. The filing of the State Court Action past the applicable statute of limitations was a**
11 **Bona Fide Error.**

12
13 P&F uses a specialized collections computer program that receives data from its clients.
14 Such data includes, but is not limited to, last payment date, attorney representation, client notes,
15 and any other pertinent information the firm should note. The software program provides distinct
16 indicators for accounts with Statute of Limitation issues to alert the attorney extra attention is
17 needed on the account. These indicators are proven effective prior to 2010 and remains so today.

18
19 The specific account in questions is an isolated, unintentional incident, which stemmed
20 from the specific set of accounts from Gerald Phillips office now coined as a "flipped account"
21 within the firm.

22
23 The "flipped" accounts required an in depth review by attorney Villanueva that is not
24 common in normally occurring accounts to the firm. The procedure the firm utilized on this
25 segment of accounts was a in depth Attorney review by attorney Villanueva. The level of
26 disarray these files were in required such policy. The attorney account review on these accounts
27 took in excess of two years, as these accounts presented a variety of issues.

28 The FDCPA is a strict liability statute which debt collectors liable for violations even when

1 they are not knowing or intentional. *See Clark v. Capital Credit & Collection Services, Inc.*, 460
 2 F.3d 1162, 1176 (9th Cir. 2006). However, the FDCPA also provides for a “narrow exception to
 3 strict liability” for bona fide errors. *Id.* at 1177. The statutory “bona fide error” defense provides:

4 A debt collector may not be held liable in any action brought under
 5 this subchapter if the debt collector shows by a preponderance of
 6 evidence that the violation was not intentional and resulted from a
 7 bona fide error notwithstanding the maintenance of procedures
 reasonably adapted to avoid any such error.

8 15 U.S.C. § 1692k(c), FDCPA Section 813.

9
 10 The bona fide error defense is an affirmative defense, for which the debt collector has
 11 burden of proof. *Fox v. Citicorp Credit Servs., Inc.*, 15 F.3d 1507, 1514 (9th Cir. 1994). The
 12 defense does not protect a debt collector whose reliance on a creditor’s representation is
 13 unreasonable. *Clark*, 460 F.3d at 1177. The defense requires the defendant to show that it
 14 maintains procedures to avoid errors. *Id.* at 1176-77.

15 The Tenth Circuit, in *Johnson v. Riddle*, specifically address the requirement that the
 16 procedures be adapted to avoid the error: “As the text of § 1692k(c) indicates, the procedures
 17 component of the bona fide error defense involves a two-step inquiry: first, whether the debt
 18 collector ‘maintained’ –i.e., actually employed or implemented – procedures to avoid error; and,
 19 second, whether the procedures were ‘reasonably adapted’ to avoid the specific error at issue.”
 20 443 F.3d 723, 729 (10th Cir. 2006). The Eighth Circuit also recently discussed the issue, affirming
 21 summary judgment for a debt collection agency based on its showing that its procedures were
 22 reasonably adapted to prevent the type of error that occurred there:

23
 24
 25 That leaves the question whether Credico made a sufficient showing
 26 that it employed procedures “reasonably adapted to avoid” the error
 27 that occurred. This is a fact-intensive inquiry that few prior cases have
 28 address. . . . The affidavits and supporting documents establish that
 Credico’s employees received specific instruction to segregate
 principal and interest in setting up the accounts received from Pinnacle
 so as to avoid charging interest on interest. The procedures were not as

1 elaborate as those in some cases that have upheld a bona fide error
2 defense, but the error to be avoided in this case was not complex.

3 *Wilhelm v. Credico, Inc.*, 519 F.3d 416, 421 (8th Cir. 2008).

4 If the bona fide error defense is to have any meaning in the context of a strict liability
5 statute, then a showing of “procedures reasonably adapted to avoid any such error” must require
6 more than a mere assertion to that effect. The procedures themselves must be explained, along
7 with the manner in which they were adapted to avoid the error. *See Wilhelm*, 519 F.3d at 421.
8 Only then is the mistake entitled to be treated as one made in good faith. *See also Clark v. Capital*
9 *Credit & Collection Services, Inc.*, 460 F.3d 1162 (9th Cir. 2006) (discussing the “bona fide” error
10 defense under 15 U.S.C. § 1692k and holding that FDCPA is a strict liability statute in that a
11 plaintiff need not prove an error was intentional); *see also Reichert v. National Credit Systems*,
12 531 F.3d 1002, (9th Cir. 2008) (discussing the “bona fide error defense” under 15 U.S.C. § 1692k
13 and holding the debt collector failed to establish this defense).

14
15 This court recently granted summary judgment on a bona fide error defense in *Libby v.*
16 *Alessi & Koenig, LLC*, 2:14-CV-00331, in which the attorney demonstrated the firm had
17 procedures reasonably adapted to prevent such errors.

18
19 Similarly, in this case, PATENAUDE & FELIX, A.P.C. maintains an active set of
20 procedures in order to ensure compliance with the provisions of the Fair Debt Collections
21 Practices Act. These procedures include, but are not limited to, the following:

- 22
23 a.) Conducting weekly manager meetings for attorneys, managers, and team leads
24 to provide up to date information about the industry and any changes to current
25 policies and procedures.
26 b.) Conducting bi-annual FDCPA training and testing for all collection staff. The
27 training and testing include topics such as, but not limited to, debt validation,
28 collection call compliance, mini-miranda, statute of limitations issues, SCRA,
FCRA, TCPA, and meaningful attorney involvement.

- 1 c.) The firm utilizes sophisticated collections software that is integrated to
2 communicate with client software to ensure accounts are within the statute of
3 limitations and the integrity of the data transmitted is secure and accurate.
- 4 d.) The firm maintains and internal IT team that ensures proper functioning of the
5 software and systems.
- 6 e.) Patenaude & Felix, A.P.C., Nevada Division, have two on-site full time
7 attorneys well versed in the FDCPA who provide immediate access to any
8 legal or collection staff who have questions regarding collection files so as to
9 ensure a consistent adherence to FDCPA policies and procedures. Patenaude &
10 Felix, A.P.C.'s FDCPA policies and procedures are designed to ensure
11 compliance with all of the applicable FDCPA requirements. However, no
12 system is completely foolproof and errors are always possible.

13 In contrast to the *Libby* case, it was attorney Villanueva who erred and approved the filing
14 of the lawsuit. This error was inadvertent and occurred despite the policies and procedures that
15 have been put into place to ensure FDCPA compliance. It is important to note that the account
16 was within the applicable statute of limitations upon placement of the account on September 15,
17 2010. It was during the review of these specific accounts over a two-year period that the account
18 had run past the statute of limitations.

19
20 **D. Attorney Villanueva was experiencing serious personal issues and tragedies during**
21 **the duration of the State Court action against Plaintiffs which support a bona fide**
22 **error defense.**

23 Attorney Villanueva has acknowledged the error on numerous occasions. The error on the
24 initial review, the error in reviewing the answer, and the error of allowing this matter to continue
25 through arbitration in the State Court Action.

26 Attorney Villanueva makes this point not to excuse his actions or error, but to simply
27 make this court aware of the human aspects attorney Villanueva was dealing with during the
28 duration of the state court case. Attached as Exhibit "B" is District Court Docket for Case No. D-

1 10-427600-Z involving Attorney Villanueva and his now deceased Ex-Wife Tiffany Villanueva
2 and the child custody issues that followed. The court minutes are detailed sufficiently to show a
3 pattern of consistent fear for the safety of his then 5 year old son and the quickly deteriorating
4 health of his ex-wife. The docket demonstrates dates and filings on behalf of Mr. Villanueva that
5 coincide with events in the State Court collection action against the Plaintiffs in this case.
6

7 At the time the errors occurred in this matter attorney Villanueva simply did not pay the
8 requisite attention to this file that it most certainly needed. No set of policies or procedures P&F
9 could have implemented can replace the attention to detail that is required of an attorney in any
10 case. Frankly, engaging in a custody battle with my dying ex-wife simply pulled my attention
11 away from the state court action. Sadly, Tiffany Villanueva passed away on May 28, 2014 at Mr.
12 Villanueva's family home he shares with his son. The events leading up to her death were no
13 doubt mentally exhausting to a point where the associate attorney in the Nevada Office Joseph
14 DiNoia was required to make the appearances on the last couple hearings in the State Court
15 Action as well as handle all issues with running the Nevada Division. Prior to this time Attorney
16 DiNoia was not involved in the Gerald Phillips "flipped" account project.
17

18 Attorney Villanueva has been a collection attorney since 2003 and this is the first instance
19 in which my error has caused P&F to be sued for a statute of limitations FDCPA violation.
20

21 / / /

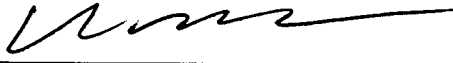
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CONCLUSION

Based on the foregoing, Defendant respectfully requests this Court grant summary judgment in favor of Defendant bona fide error. In the alternative, Defendant respectfully requests this Court limit Plaintiff's damage to statutory damages of \$1,000.00 and deny Plaintiff's other claims for relief. Plaintiff suffered no actual damages as Plaintiff defaulted on his credit card account held by Capital One Bank.

DATED this 26th day of November, 2014

By: 
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PROOF OF SERVICE

I am resident of the State of Nevada, over the age of eighteen years, and not a party to the within action. My business address is 7271 W. Charleston, Suite 100, Las Vegas, NV 89052. On November 26, 2014, I served the within document(s):

OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

☐ By **U.S. Mail** a copy of the document(s) listed above to the person(s) at the address(es) set forth below.

☒ By **CM/ECF/Clark County Wiznet Filing Pursuant to EDCR 8.05(a)** – with the United States District Court of Nevada, or Clark County District Court, District of Nevada EDCR 8.05(a), a copy of the Court's notification of e-filing is attached to the hard copy for either faxing, mailing, overnight delivery, and/or hand-delivery.

☐ By **Facsimile Transmission** – the transmission was reported as complete and without error. A copy of the transmission report, properly issued by the transmitting machine, is **attached** to the hard copy. The names and facsimile numbers of the person(s) served are as set forth below:

☐ By **Overnight Delivery** – by depositing a true copy of the same enclosed in a sealed envelope, with delivery fees provided for, in an overnight delivery service pick up box or office designated for overnight delivery, and addressed as set forth below.

☐ By personally delivering a copy of the document(s) listed above to the person(s) at the address(es) set forth below.

**Craig Friedberg, Esq.
4760 South Pecos Road, Suite 103
Las Vegas, NV 89121
Attorney for Plaintiffs**

I declare under penalty of perjury that the foregoing is true and correct.



An employee of Patenaude & Felix, A.P.C.